SUPREME COURT, U.S.
FILED

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No. _____

In The

Supreme Court Of The United States

October Term, 1996

HOWARD MEEHAN,

Petitioner,

v.

TOWN OF EAST LYME, EAST LYME BOARD OF EDUCATION, HAROLD ROWE, WRAY ABERCROMBIE, JOSEPH MINGO, KAREN PARKS, HAROLD KAPLAN, ANN MARIE FOSTER, THEODORE JABLKOWSKI, MARY BRODERICK, JAMES ANDERSON, CHRISTOPHER SWEITZER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Circuit Court erred in affirming the District Court's determination that Petitioner's previously concluded state proceedings complied with minimum federal due process in giving him a full and fair opportunity to present all his claims with the result that review of Petitioner's federal claims was barred by Connecticut's doctrines of claim preclusion and issue preclusion?

2. Whether the District Court erred in belatedly raising, *sua sponte*, the issues of claim preclusion and issue preclusion after the Petitioner's state proceedings had concluded, without considering whether Respondents had waived these issues in federal court by failing to raise them in their pleadings or to argue them in their motion for summary judgment and without considering the incurable prejudice resulting therefrom to the Petitioner?

PARTIES TO THE PROCEEDING

Petitioner, Howard Meehan, is a resident of Madison, New Haven County, Connecticut. Petitioner was the Plaintiff in the United States District Court proceedings and was the Appellant before the United States Court of Appeals for the Second Circuit.

Respondent, The Town of East Lyme is a municipal corporation of the State of Connecticut, the East Lyme Board of Education is the agency through which East Lyme maintains control of its public schools, and individual members of the East Lyme Board of Education, namely, Harold Rowe, Wray Abercrombie, Joseph Mingo, Karen Parks, Harold Kaplan, Ann Marie Foster, Theodore Jablkowski, Mary Broderick, James Anderson and Christopher Sweitzer, are residents of New London County, Connecticut. Respondents were the Defendants in the United State District Court proceedings and were the Appellees before the United States Court of Appeals for the Second Circuit.

There are no other parties to this action.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

HOWARD MEEHAN, PETITIONER

v.

TOWN OF EAST LYME, EAST LYME BOARD OF EDUCATION, HAROLD ROWE, WRAY ABERCROMBIE, JOSEPH MINGO, KAREN PARKS, HAROLD KAPLAN, ANN MARIE FOSTER, THEODORE JABLKOWSKI, MARY BRODERICK, JAMES ANDERSON, CHRISTOPHER SWEITZER, RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Howard Meehan, respectfully requests that this Court grant a writ of certiorari seeking review of a summary order of the United States Court of Appeals for the Second Circuit in Howard Meehan v. East Lyme Board of Education, Town of East Lyme, Harold Rowe, Wray Abercrombie, Joseph Mingo, Karen Parks, Harold Kaplan, Ann Marie Foster, Theodore

Jablkowski, Mary Broderick, James Anderson and Christopher Sweitzer, filed October 31, 1996. (*see* Petitioner's Appendix at 1a-25a, hereinafter "*Pet. App.* p. ___").

OPINION AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of the District Court, No. 96-7454, is an unpublished decision. *Pet. App. pp. 1a-5a.*

The order of the United States District Court for the District of Connecticut, affirming Appellee's Motion for Summary Judgment based on issue and claim preclusion is reported in 37 Conn. App. 922 (1995). *Pet. App. pp. 6a-20a.*

The Supreme Court of Connecticut's Denial of Petitioner's Certification for Appeal from Appellate Court Filed June 1, 1995 is reported in 234 Conn. 904 (1995). *Pet. App. p. 21a.*

The Appellate Court of Connecticut's Per Curiam Ruling Affirming Judgment of the Superior Court Filed April 18, 1995 is reported in 37 Conn. App. 922 (1995). *Pet. App. p. 22a.*

The Superior Court of Connecticut, Judicial District of New London at New London, Memorandum of Decision Filed March 9, 1994, No. 525063. *Pet. App. pp. 23a-30a.*

STATEMENT OF JURISDICTION

On October 31, 1996, the United States Court of Appeals for the Second Circuit entered a summary order following oral argument, affirming the District Court's order granting Respondent's Motion for Summary Judgment based on matters of issue and claim preclusion. This court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

The Petitioner is relying upon Rule 10 of the Rules of the Supreme Court of the United States in filing this petition.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 ("Cases in the court of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition or any party to any civil or criminal case, before or after rendition of judgment or decree").

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment XIV:

Section 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Rules of Civil Procedure Rule 8

Rule 8. General Rules of Pleading

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

STATEMENT OF THE CASE

A. Introduction

This petition raises important Constitutional questions as to whether:

(1) the Connecticut Court proceedings afforded the Petitioner minimal federal due process so as to preclude federal court review of his federal claims and

(2) the District Court properly raised, *sua sponte*, issues of claim preclusion and issue preclusion after the Petitioner's state proceedings had concluded, without considering whether the Respondents had waived same by failing to plead and argue them and without considering the prejudice resulting therefrom to the Petitioner.

B. Facts Material to the Consideration of the Question Presented

Plaintiff-Petitioner, a tenured teacher, appealed a decision by Defendant-Respondent, East Lyme Board of Education terminating his employment. The appeal was brought to the Connecticut Superior Court. The Petitioner, Howard Meehan, contended that various aspects of his termination violated due process. Specifically, Meehan claimed that the notice letter and the hearings conducted by the Board violated state and

federal due process. The Superior Court ruled that the actions of the Board "met the requirements of due process under federal and state law" and found in favor of the Board. *Meehan v. East Lyme Board of Education*, No. CV52-50-63-S, slip op. at 6-7 (Judicial District of New London at New London, March 9, 1994). The Petitioner then appealed to the Connecticut Appellate Court, citing violations of both state and federal due process. The Appellate Court, per curiam, without comment or legal citation, merely affirmed the judgment of the Superior Court. Subsequently, Petitioner's petition for certification to the Supreme Court of Connecticut was denied (Pet. App. at 21a). *Howard Meehan v. Board of Education of the Town of East Lyme*, 37 Conn. App. 922, cert. denied, 234 Conn. 904 (1995).

After judgment was entered in the Superior Court and while his appeal to the Appellate Court was pending, the Petitioner, on October 28, 1994, filed the instant action in the United States District Court for the District of Connecticut under 42 U.S.C. §1983 claiming that his federal due process rights were violated when he was discharged from his tenured position. Before the Appellate Court issued its ruling on Petitioner's appeal, the Respondents requested from the District Court an extension of time for discovery and dispositive motions on the grounds that they believed they would be able to obtain summary judgment in the District Court action, depending on the outcome in the Appellate Court. The District Court granted the motion. After the Appellate Court decision in their favor, and the denial of certification by the

Supreme Court, the Respondents in the District Court action, which included additional individual Respondents not named in the state suit, initiated their Motion for Summary Judgment. The Respondents failed to raise the defenses of issue preclusion and claim preclusion as affirmative defenses, nor did they raise these defenses in their initial brief to the court in their Summary Judgment action. It was not until oral argument, that the District Court, *sua sponte*, specifically requested that the parties brief the issue of whether the Petitioner's action in the District Court might be barred under the doctrines of claim and/or issue preclusion (formerly res judicata and collateral estoppel, respectively), as a result of the proceedings in the state courts.

On March 20, 1996 (final judgment was entered in favor of the Respondents on March 22, 1996), the District Court granted the Respondents' Motion for Summary Judgment finding that the Petitioner was precluded from bringing his claim in the District Court by Connecticut's doctrines of claim and issue preclusion (res judicata and collateral estoppel, respectively). On April 17, 1996, the Petitioner, Howard Meehan, appealed the decision to the United States Court of Appeals for the Second Circuit.

On October 31, 1996, the United States Court of Appeals for the Second Circuit, in an unpublished summary order, affirmed the District Court's order granting Appellee's Motion for Summary Judgment.

REASONS FOR GRANTING THE WRIT

1. The Circuit Court erred in affirming the District Court's determination that Petitioner's previously concluded state proceedings complied with minimum federal due process in giving him a full and fair opportunity to present all his claims with the result that review of Petitioner's federal claims was barred by Connecticut's doctrines of claim preclusion and issue preclusion.

The United States Court of Appeals for the Second Circuit, on appeal, affirmed the ruling of the District Court for the District of Connecticut granting Respondents' Motion for Summary Judgment. In ruling on the Motion for Summary Judgment, the District Court concluded that claim preclusion applies to bar the federal action against the Board of Education and those in privity with the Board, namely, the Town of East Lyme, Superintendent Rowe and Board members in their official capacities. (Pet. App. at 6a). The District Court correctly concluded that the doctrine of claim preclusion, however, does not bar the present action as to Rowe and the named Board of Education members in their individual capacities. See also *Gregory v. Chehi*, 843 F.2d 11, 120-121 (3d Cir. 1988); *Restatement (Second) of Judgments* § 36(2). The Court, nevertheless, determined that "Meehan's action against Rowe and the Board members in their individual capacities is barred by the doctrine of issue preclusion

because the issue of whether his termination violated federal due process had already been presented to, considered and rejected by the Connecticut Superior Court." Accordingly, it is necessary to examine what the Superior Court actually decided in order to determine whether the Petitioner had a "full and fair opportunity" to litigate his claim.

The appeal before the Superior Court was a statutory administrative appeal governed and limited by the provisions of the Connecticut Teachers Tenure Act, Conn. Gen Stat. §10-151. In its decision, the Superior Court observed that "[w]hen the board terminates a teacher's contract it is an administrative agency acting in a quasi-judicial capacity." (citations omitted). In reviewing the actions of a board of education pursuant to §10-151(f), the Superior Court acknowledged that it does not substitute its judgment for that of the Board and is limited in determining whether the Board acted illegally. The Superior Court, therefore, did not conduct a trial *de novo*, but made only limited findings based on the statutory proceedings before the Board. It considered only the official return of record of proceedings before the Board and then concluded, without specifying reasons:

> The court finds, therefore, that THE ACTIONS OF THE BOARD met the requirements of due process under federal and state law.

> For the reasons stated above, the court finds that THE BOARD DID NOT ACT ILLEGALLY in its decision to terminate the Plaintiff's contract of employment. Accordingly, the Plaintiff's appeal is dismissed. (Pet. App. at 24a) (emphasis added).

On a statutory appeal, the Superior Court could only consider and decide issues within the framework of the controlling statute, in this case Conn. Gen. Stat. § 10-151. Individual Board members were not and could not, be made parties to the appeal, and the same applied to Superintendent Rowe. Thus, the only issues decided by the Superior Court were related to official actions of the Board. Since the Court neither heard additional testimony, nor received any additional evidence, it cannot be said that the Petitioner had "a full and fair opportunity" to litigate his claims.

Thereafter, the Petitioner appealed the Superior Court's decision to the Connecticut Appellate Court. The only federal issue raised before the Appellate Court, as a background to the state issues, was whether Rowe's notice letter satisfied the notice requirements of federal due process. All the other issues were state law issues. While the Appellate Court appeal was pending, the Petitioner, on October 28, 1994, filed the present § 1983 action in Federal District Court. On April 18, 1995, the Appellate Court affirmed the Superior Court's decision, per curium, and without comment, despite the issues raised by the Petitioner in his brief. *Meehan v. Board of Educ. Town of East Lyme*, 37

Conn. App. 922 (1995) (Pet. App. at 20a). On June 1, 1995, the Supreme Court of Connecticut denied the Petitioner's certification for appeal from the Appellate Court, also without comment. *Meehan v. Board of Educ. Town of East Lyme*, 224 Conn. 904 (1995)(Pet. App. at 21a).

The denial of Petitioner's appeal by the Appellate Court, without opinion, and the subsequent refusal of certification to appeal by the Supreme Court of Connecticut, also focuses upon the issue of whether the Petitioner had a "full and fair opportunity" to litigate his claims in the entire state court appellate procedure. See *United Parcel Service v. California Pub. Utilities*, 77 F.3d 1178 (1996). The 9th Circuit Court, noting that access to the Supreme Court of California is by petition for a writ of certiorari (certification) rather than by appeal, observed:

> Where the California Supreme Court grants review, it receives the record, hears argument, and renders an opinion. In such cases the due process requirements for issue preclusion are indisputably met. However, when the court denies review, it neither receives the record nor hears oral argument. The litigant whose petition for review is denied thus cannot be said to have received a full and fair opportunity to litigate his claims. Where moreover, the court issues a denial without opinion or

> comment, as it did in the case before us, the basis for the denial cannot be determined or reviewed. *Id.* at 1187.

The Circuit Court, while acknowledging that the California Supreme Court had granted affirmation to this practice, further noted its concern by stating:

> ... we have serious reservations as to the propriety of according res judicata effect to the California Supreme Court's summary denial of a writ of review, where such a denial cannot possibly be said to have afforded the plaintiff a "full and fair opportunity" to litigate its federal claims ... *Id.* at 1188.

The Court agreed that while a state court judgment "[g]enerally has the same preclusive effect in federal court as that judgment would have in the courts of the rendering state," *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 465 (1982), there are certain exceptions to this rule, *United Parcel Service*, 77 F.3d at 1187:

> The primary exception ... is that we do not give preclusive effect to judgments rendered in proceedings that fail to comply with the minimum standards of due process. In other words, the party against whom preclusion is urged must have had a "full and fair opportunity" to

litigate his claim. *Clements v. Airport Authority of Washoe County*, 69 F.3d at 328 (citing Kremer, 456 U.S. at 480-82, 102 S.Ct. at 1897).

In circumstances similar to the appellate process in *United Parcel Service*, the District Court in the present case did not consider on the Motion for Summary Judgment whether the Petitioner was denied a "full and fair opportunity" to litigate his claims in the state courts, and therefore, the general preclusionary rule of *Kremer* and *Migra* did not apply. For this reason, the Motion for Summary Judgment should have been denied.

2. The District Court erred in belatedly raising, sua sponte, the issues of claim preclusion and issue preclusion after the Petitioner's state proceedings had concluded, without considering whether Respondents had waived these issues in federal court by failing to raise them in their pleadings or to argue them in their motion for summary judgment and without considering the incurable prejudice resulting therefrom to the Petitioner.

A defendant seeking to avail himself of the defense of claim preclusion or issue preclusion in Connecticut must affirmatively plead it by a special defense. *Conn. Practice Book* § 164 (explicitly states that " ... res judicata must be specially pleaded ..."); *Chomko v. Patmon*, 20 Conn. App. 159, 162 (1989) (collateral estoppel should be affirmatively pleaded). In

the federal courts also, claim preclusion and issue preclusion are affirmative defenses which may be deemed waived if not raised in the pleadings. *Kern Oil v. Tenneco*, 840 F.2d 730, 734-35 (9th Cir. 1988); See Fed. R. Civ. P. 8(c). "The principles of waiver that apply to claim preclusion defenses also apply to issue preclusion." *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 329 (1995). Additionally, the failure of a defendant to object to the prosecution of dual proceedings while both proceedings are pending constitutes a waiver. *Kern Oil*, 840 F.2d at 734-5; See also, *Calderon Rosado v. General Electric*, 805 F.2d 1085 (1st Cir. 1986) (court ruled claim preclusion inapplicable because defendant had acquiesced to splitting of the claim when he failed to object or complain while the two actions were pending). *Restatement (Second) of Judgments*, §26(1)(a) (1982), also provides that the general rule against splitting claims "does not apply to extinguish the claim and part or all of the claim subsists as a possible basis for a second action ... [where] the parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant acquiesced therein." *Restatement (Second) of Judgments*, § 26, comment a, is even more explicit:

> Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the

> plaintiff from proceeding and obtaining judgment in the other action. The failure of the defendant to object to the splitting of the plaintiff's claim is effective as an acquiescence in the splitting of the claim.

Since the main purpose behind the rule against claim splitting is "to protect the defendant from being harassed by repetitive actions based on the same claim," it follows that the rule should be inapplicable where the defendant explicitly or implicitly acquiesces in the split. *Id.* at comment a. The pleading and conduct of the Respondents amounted to waiver which vitiated the applicability of the doctrines of claim and issue preclusion. The extent and nature of this waiver sets forth a genuine issue of material fact and accordingly, the Motion for Summary Judgment should have been denied.

The Circuit Court in reviewing the issue of waiver can consider it *sua sponte* and, in doing so, looks at the entire record in the federal action. See *Clements*, 69 F.3d at 329. The District Court record in this case discloses that the Respondents raised one and only one affirmative defense, that of qualified immunity. Neither the defense of claim preclusion (res judicata) nor issue preclusion (collateral estoppel) was affirmatively raised by the Respondents in the pleadings, as the rules required. The Respondents did not raise or brief these claims in their Motion for Summary Judgment. Only on oral argument did the Court itself, *sua sponte* raise these issues and instruct

the parties to file supplemental briefs on them. The compelling inference is that the Respondents did not intend to raise these defenses in the federal action and in effect waived them. By this time, the appeal from the Superior Court was no longer pending in the state court system. The Respondents could and should have raised the preclusion issues while the state appeal was still pending instead of prejudicing the Petitioner's rights in state court by waiting until the state court action was concluded before initiating their Motion for Summary Judgment. The general rule is that a judgment may be treated as final for purposes of preclusion notwithstanding the fact that it may be reversed on appeal. See *Restatement (Second) Judgments* § 132 and comment f, § 16 and comment a; see also, *Southwestern Elec. Power v. Martin*, 844 S.W.2d 229, 236 (Tex. App. 1992) ("judgment is final for purposes of issue and claim preclusion despite the taking of an appeal ("except where the appeal is trial *de novo*")). The Superior Court review of an appeal under the Connecticut Teacher Tenure Act, § 10-151, is not a trial *de novo*. Moreover, in a Motion for Summary Judgment all inferences and ambiguities must be resolved in favor of the non-moving party. *Aldrich v. Randolph Cent. School Dist.*, 963 F.2d 520, 523 (2d Cir. 1993); *Central Hudson Gas & Elec.*, 56 F3d at 364. The Court looks to the pleadings filed to determine whether an issue of fact exists.

During oral argument on Respondents' Motion for Summary Judgment, Judge Nevas, for the first time raised, *sua sponte*, the preclusion issues and "instructed" the parties to file supplemental briefs on

these issues. It was only then that the Respondents were moved to consider claim and issue preclusion in this case, but even then, the Respondents did not move to amend the pleadings to include the preclusion claims as affirmative defenses.

In addition, the Respondents never objected at any time to the splitting of any claims or to the prosecution of two cases at the same time in the state and federal courts. The Respondents had more than adequate time to do so, since the two cases were pending together from October 28, 1994, when the federal action was brought, until June 1, 1995, when the Supreme Court of Connecticut denied certification to the state appeal. The Respondents, in fact, made no mention of claim and issue preclusion until the filing of their supplemental brief on December 8, 1995, pursuant to the order of Judge Nevas.

Clearly, the Respondents waived their right to assert claim preclusion and issue preclusion as defenses in this action. Whether these defenses were overlooked or deliberately abandoned by the Respondents is of no consequence, because the effect is the same: **to allow them to be asserted now would work a substantial injustice on the Petitioner, and would vitiate the rule that these defenses must be affirmatively pleaded**. The pleadings and the conduct of the Respondents compelled the conclusion that the Respondents waived claim preclusion and issue preclusion in this case. Unfortunately, the District Court, *sua sponte*, belatedly raised the

preclusion issue but did not consider waiver nor instruct the parties to brief that issue. The District Court was not aware of this error and of the potential prejudice flowing to the Petitioner. Waiver and its effects constitute a genuine issue of material fact. As the court in *Clements* correctly observed:

> Allowing the defendants to assert claim preclusion at this late stage would work a substantial injustice on the plaintiffs. At the time the federal action was commenced, the petition for judicial review was still pending in the state district court. **If the defendants had asserted their defense at that time, either by formally objecting to the dual proceedings through a motion to dismiss or by asserting the defense in their responsive pleadings, the plaintiffs would have had timely notice of the defendant's claim and would have been able to take appropriate action in the state proceedings (e.g., by attempting to amend the petition for judicial review to include the claims raised in the § 1983 action ...** We hold that the defendants have waived any defense premised on claim preclusion in this federal action. *Clements*, 69 F.3d at 329. (emphasis added).

Accordingly, it was reversible error for the District Court in this case to grant summary judgment in favor of the Respondents on the grounds of claim and issue preclusion when these affirmative defenses did not apply because they had been waived and the question of waiver created a genuine issue of material fact to be resolved by trial. The Respondents failed to show that there was no genuine issue of material fact and thus, summary judgment should have been denied.

Finally, while it is true that, in the absence of prejudice, an affirmative defense may be raised for the first time at summary judgment, the court must determine whether prejudice is claimed by the parties or suggested by the record. See *Camarillo v. McCarthy*,998 F. 2d 638, 639 (9th Cir. 1993). The record discloses that when the District Court, *sua sponte*, raised these affirmative defenses on oral argument on Respondents' motion for summary judgment, Petitioner's state court proceedings had already concluded. The Petitioner, therefore, was incurably prejudiced in that he could no longer take appropriate action in the state proceedings.

CONCLUSION

Based on the foregoing reasons, the Petitioner, Howard Meehan, respectfully requests that this Honorable Court direct a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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New London, CT 06320
(860) 442-4428

Attorney for Petitioner

No. _____

In The
Supreme Court Of The United States

October Term, 1996

HOWARD MEEHAN,

Petitioner,

v.

TOWN OF EAST LYME, EAST LYME BOARD OF EDUCATION, HAROLD ROWE, WRAY ABERCROMBIE, JOSEPH MINGO, KAREN PARKS, HAROLD KAPLAN, ANN MARIE FOSTER, THEODORE JABLKOWSKI, MARY BRODERICK, JAMES ANDERSON, CHRISTOPHER SWEITZER,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-first day of October, one thousand nine hundred and ninety-six.

Present:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE RALPH K. WINTER,
HONORABLE FRANK X. ALTIMARI,

Circuit Judges

United States Court of Appeals
Filed
October 31, 1996
George Lange III, Clerk
Second Circuit

HOWARD MEEHAN,

Plaintiff-Appellant,

v. **No. 96-7454**

EAST LYME BOARD OF EDUCATION, TOWN OF EAST LYME, HAROLD ROWE, WRAY ABERCROMBIE, JOSEPH MINGO, KAREN PARKS, HAROLD KAPLAN, ANN MARIE FOSTER, THEODORE JABLKOWSKI, MARY BRODERICK, JAMES ANDERSON AND CHRISTOPHER SWEITZER,

Defendants-Appellees

Appearing for Appellant: Gilbert Shasha,
New London,
Connecticut

Appearing for Appellees: Kenneth J. McDonnell,
Gould, Larson,
Bennet, Wells,
& McDonnell,
Essex, Connecticut

Oct. 31, 1996.
Appeal from the United States District Court for the District of Connecticut (Nevas, Judge).

SUMMARY ORDER

This cause came to be heard on the transcript of record from the United States District Court for the District of Connecticut and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby affirmed.

Howard Meehan appeals from Judge Nevas's grant of summary judgment to appellees. His appeal claims several errors by the district court: (i) that appellees waived the defenses of issue and claim preclusion, (ii) that the state proceedings failed to comply with minimum due process standards and did not afford Meehan a "full and fair opportunity" to litigate his claims, (iii) that the district court abused its discretion in granting appellees' motion for an extension of time, and (iv) that the district court erred in ruling that the present action was barred as to Rowe and other board members under Connecticut's doctrine of issue preclusion.

"In resolving the issues raised on appeal from a grant of summary judgment, 'we review the record de novo to determine whether there are genuine issues of material fact requiring a trial.'

"*Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir.1992) (quoting *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.1991)). We hold that Connecticut's doctrine of claim preclusion bars appellant's present action against appellees in their official capacity and that

Connecticut's doctrine of issue preclusion bars the action against appellees in their individual capacities, for substantially the reasons stated by the district court. *Meehan v. Town of East Lyme*, 919 F.Supp. 80 (D.Conn.1996). We address briefly the plaintiff's contention that defendants waived these affirmative defenses, that the Connecticut proceedings did not afford the plaintiff minimal federal due process, and that the district court abused its discretion in granting defendants' motion for extension of time.

Claim and issue preclusion are affirmative defenses that should be pleaded under Rule 8(c), Fed.R.Civ.P. "The purpose of such pleading is to give the opposing party notice of the plea of estoppel and a chance to argue, if he can, why the imposition of an estoppel would be inappropriate." *Blonder-Tongue Lab., Inc. v. University of Illinois Found.*, 402 U.S. 313, 350 (1971). "In the absence of a showing of prejudice, however, an affirmative defense may be raised for the first time at summary judgment." *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir.1993); see also *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 593 (1st Cir.), cert. denied, 116 S.Ct. 51 (1995); *United States v. Shanbaum*, 10 F.3d 305, 313 (5th Cir.1994); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 334 (7th Cir.1987).

In the instant case, Meehan was not prejudiced in his ability to respond to the affirmative defenses. Rather, Meehan filed a supplemental memorandum that opposed the application of the doctrines but did not claim surprise or prejudice. Thus, the instant case is distinguishable from *Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d

730, 735 (9th Cir.), cert. denied, 488 U.S. 948 (1988), in which the affirmative defenses were not raised until after trial.

We also hold that the state proceedings did meet minimum federal due process requirements and gave Meehan a "full and fair opportunity" to litigate his claim. To rule on Meehan's appeal, the superior court had to "determine whether the appropriate procedure under the statute and the state and federal constitutions was employed and whether the evidence relied upon was reliable and substantial." *Lee v. Board of Education*, 181 Conn. 69, 81 (1980) (citations omitted). That the superior court "neither heard additional testimony nor received any additional evidence" is immaterial; indeed, under the previous Connecticut statute operative at the time of the case, appellant had the opportunity to introduce new evidence in the appeal to the superior court. See 10 C.G.S. § 10-151(f), as amended by P.A. 95-98 § 2 (1995). We are bound by the general rule that a state court judgment has the same preclusive effect in federal court as it would have in the courts of the rendering state. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982).

Finally, appellant's argument that the district court abused its discretion in granting the appellees' motion for extension of time is frivolous. Indeed, he did not object to the motion in the district court.
We therefore affirm.

Howard MEEHAN

v.

TOWN OF EAST LYME, et al.

Civil No. 3:94CV1825 (AHN).

United States District Court,
D. Connecticut.

March 20, 1996.

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

NEVAS, District Judge.

The plaintiff, Howard Meehan ("Meehan"), a former teacher in the East Lyme, Connecticut school district, brings this civil rights action against the Town of East Lyme, the Board of Education of East Lyme ("Board"), the members of the Board in their official and individual capacities, and the former East Lyme Superintendent of Schools, Harold G. Rowe ("Rowe"), in his official and individual capacity (hereinafter collectively "the defendants"). Meehan alleges that his removal from his tenured teaching position denied his right to procedural due process under the Fourteenth Amendment of the United States Constitution in violation of 42 U.S.C. § 1983.

Presently pending is the defendants' motion for summary judgment. For the reasons that follow, defendants'

Motion for Summary Judgment [doc. # 26] is GRANTED.

STANDARD

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P.; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). A court must grant summary judgment " 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact.' " *Miner v. City of Glens Falls*, 999 F.2d 655, 661 (2d Cir.1993) (citation omitted). "A dispute regarding a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir.) (quoting *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510), cert. denied, 506 U.S. 965, 113 S.Ct. 440, 121 L.Ed.2d 359 (1992). After discovery, if the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). The court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." *Aldrich*, 963 F.2d at 523. Thus, "[o]nly when reasonable minds could not differ as to the

import of the evidence is summary judgment proper." *Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.), cert. denied, 502 U.S. 849, 112 S.Ct. 152, 116 L.Ed.2d 117 (1991). See also *Suburban Propane v. Proctor Gas, Inc.*, 953 F.2d 780, 788 (2d Cir.1992).

FACTS

The court finds the relevant facts as follows. Meehan began teaching in the East Lyme school system in 1974 as a general science teacher at the East Lyme Junior High School and later at the East Lyme Middle School. Since 1974, he taught sixth, seventh, and eighth grade science to children ranging in age from ten to fourteen years.

On June 17, 1992, Rowe notified Meehan that the Board would consider the termination of his tenure contract at its next regular meeting on June 22, 1992. (See R. on Appeal to Appellate Court, *Howard Meehan v. East Lyme Bd. of Educ.*, No. A.C. 13441, at 4 [hereinafter "R."].) During the regular meeting, the Board voted to consider the termination of Meehan's employment contract and Meehan received notice of this vote by letter dated June 23, 1992. (Id. at 5.) Within the period prescribed by Conn.Gen.Stat. § 10-151(d), Meehan timely requested a statement of reasons for the Board's decision and a hearing. (Id.)

By letter dated June 30, 1992, Rowe sent Meehan a statement of the reasons underlying the Board's vote to consider his termination ("notice letter"). The notice letter listed the reasons as: 1) inefficiency and incompetence; 2) insubordination against the reasonable

rules of the Board; and 3) other due and sufficient cause. (Id. at 5, 48.) The notice letter also included a list of twenty-four allegations against Meehan, divided into eight separate categories. (Id. at 48-51.) In addition, it referred Meehan to his personnel file, which Rowe characterized as being "replete with instances which fall within the issues described above...." (Id. at 51.) The Board then provided Meehan with a copy of his entire personnel file by July 1, 1992. (Id. at 76.)

Subsequently, the Board held the requested evidentiary hearings on the charges against Meehan on nineteen dates, from July 24 to October 7, 1992. (Id. at 5- 6, 72.) The Board deliberated on October 15 and 16, and issued its findings of fact and conclusions. (Id. at 6.) Rowe signed the Board's findings and conclusions on October 29, 1992, which terminated Meehan's contract. (Id. at 72.)

Meehan appealed the Board's decision to the Connecticut Superior Court pursuant to Conn.Gen.Stat. § 10-151(f) and sought back-pay and reinstatement. (Id. at 20-51.) On appeal, he contended that various aspects of his termination violated due process. Specifically, Meehan alleged that Rowe's notice letter, (see id. at 23-24, 28-30, 38, 72-73), and the hearings conducted by the Board, (see id. at 31-38), violated state and federal due process.

After a bench trial, Judge Hendel of the Connecticut Superior Court found by Memorandum of Decision dated March 9, 1994, that the actions of the Board, including Rowe's notice letter, "met the requirements of due

process under federal and state law" and dismissed Meehan's appeal. *Meehan v. East Lyme Bd. of Educ.*, No. CV52-50-63-S, slip op. at 6-7 (Judicial Dist. of New London at New London, Mar. 9, 1994) (See R. at 76-77.)

Meehan appealed this decision to the Connecticut Appellate Court, claiming that the notice letter violated both state and federal due process. (Id. at 80-81.)

Meehan then initiated the present action on October 28, 1994, once again alleging that his termination, including Rowe's notice letter and the hearings conducted by the Board, violated his due process rights under the Fourteenth Amendment. (Se Compl. ¶¶ 98-114.)

On April 18, 1995, the Connecticut Appellate Court affirmed the Superior Court's decision, per curiam, without comment. *Meehan v. Board of Educ. Town of East Lyme*, 37 Conn.App. 922, 655 A.2d 1177 (1995). On June 1, 1995, the Connecticut Supreme Court denied Meehan's certification for appeal from the Appellate Court. *Meehan v. Board of Educ. Town of East Lyme*, 234 Conn. 904, 659 A.2d 1205 (1995).

DISCUSSION

At oral argument on defendants' motion on October 30, 1995, the court indicated to the parties that the doctrines of claim and/or issue preclusion (formerly res judicata and collateral estoppel, respectively) [FN1] might bar Meehan's section 1983 action. Accordingly, it instructed the parties to file supplemental briefs by December 8,

1995, addressing the application of these doctrines and *Kaufman v. Somers Bd. of Educ.*, 368 F.Supp. 28 (D.Conn.1973) to the present action.

> FN1. The court hereinafter refers to the doctrine of res judicata as claim preclusion and the doctrine of collateral estoppel as issue preclusion. See *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984); Restatement (Second) of Judgments §§ 17-26, 27-29 (1982) (hereinafter "Restatement (Second)").

The defendants argue in their supplemental brief that, because Meehan argued unsuccessfully in his state appeal that his termination violated his rights to federal due process, his section 1983 action based on the same violations is now barred by the doctrines of claim and issue preclusion. The court agrees.

The full faith and credit statute, 28 U.S.C. § 1738, directs a federal court to refer to the preclusive law of the state in which a prior judgment was rendered to determine the preclusive effect of that judgment in a subsequent federal lawsuit. See *Marrese v. American Acad. of Orthopaedic Surg.*, 470 U.S. 373, 380, 105 S.Ct. 1327, 1331, 84 L.Ed.2d 274 (1985). See also *Valley Disposal v. Central Vermont Solid Waste Dist.*, 31 F.3d 89, 98 (2d Cir.1994). Accordingly, the court determines whether Connecticut's doctrines of claim and issue preclusion would bar the present action.

I. Claim Preclusion

In Connecticut, "[u]nder the doctrine of res judicata, or claim preclusion, a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action on the same claim. A judgment is final not only as to every matter which was offered to sustain the claim, but also as to any other admissible matter which might have been offered for that purpose." *DeMilo & Co. v. Commissioner of Motor Vehicles*, 233 Conn. 281, 292, 659 A.2d 162 (1995) (citations and internal quotations omitted; emphasis in original). See also *Commissioner of Environmental Protection v. Connecticut Bldg. Wrecking Co.*, 227 Conn. 175, 188, 629 A.2d 1116 (1993) ("claim preclusion prevents the pursuit of any claims relating to the cause of action which were actually made or might have been made.") (citations and internal quotations omitted).

Connecticut courts have adopted the "transaction test" of the Restatement (Second) "to determine whether an action involves the same claim as an earlier action so as to trigger operation of the doctrine of [claim preclusion]." Connecticut Bldg. Wrecking Co., 227 Conn. at 189, 629 A.2d 1116. See also *Orselet v. DeMatteo*, 206 Conn. 542, 545-46, 539 A.2d 95 (1988); *Duhaime v. American Reserve Life Ins. Co.*, 200 Conn. 360, 364-66, 511 A.2d 333 (1986). Section 24 of the Restatement (Second) provides: the claim [that is] extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. What factual grouping constitutes a 'transaction,' and

what groupings constitute a 'series', are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Restatement (Second) § 24. As section 25 elaborates: "[t]he rule of § 24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action (1) [t]o present evidence or grounds or theories of the case not presented in the first action, or (2) [t]o seek remedies or forms of relief not demanded in the first action." Id. § 25.

In applying the "transactional test", Connecticut courts "compare the complaint in the second action with the pleadings and the judgment of the first action." Connecticut Bldg. Wrecking Co., 227 Conn. at 190, 629 A.2d 1116. See also Duhaime, 200 Conn. at 365, 511 A.2d 333 (courts look to the group of facts alleged to have caused the unlawful injury and note that even if a group of facts gives rise to several kinds of relief, it is still a single cause of action).

Application of the "transactional test" requires the conclusion that Meehan's section 1983 claim arises from the same transaction or series of transactions as his prior administrative appeal. A comparison of the complaint in this action with Meehan's pleadings in his administrative appeal and the Superior Court judgment demonstrates that the group of facts or transactions which Meehan claims to have unlawfully injured him are identical in both

actions: the circumstances surrounding his termination by the Board, including Rowe's notice letter and the adequacy of the termination hearings. (Compare Compl. ¶¶ 98-144 with R. at 23-24, 28-38, 72-73, 76-77, 80-81.)

Meehan unsuccessfully challenged his termination through a statutory appeals process. See Conn.Gen.Stat. § 10-151(f). He again challenges his termination albeit in the guise of a section 1983 action. Meehan cannot now attempt to relitigate the same claim under a new theory in order to obtain an alternate remedy. See Duhaime, 200 Conn. at 366, 511 A.2d 333. See also Restatement (Second) § 25.

Further, it is of no moment that the prior judgment arose in the context of an administrative appeal. Under circumstances strikingly similar to Meehan's, this district has previously determined that the dismissal of a teacher's administrative appeal by a Connecticut trial court barred his subsequent section 1983 action against the board of education. See Kaufman, 368 F.Supp. at 31-37.

Finally, it is irrelevant for the purposes of Connecticut's claim preclusion rules that Meehan's present due process challenge to his termination is couched in terms of a civil rights action under section 1983; section 1983 does not vitiate state preclusion law. See Migra, 465 U.S. at 85, 104 S.Ct. at 898.

Accordingly, the court determines that the present action arises out of the same transaction or series of transactions as Meehan's administrative appeal for the

purposes of claim preclusion.

However, this does not end the court's claim preclusion analysis because that doctrine bars a subsequent action only between the same parties or those in privity with them. See Connecticut Bldg. Wrecking Co., 227 Conn. at 188, 629 A.2d 1116. The named defendants in this action are different from those in the first. Whereas Meehan's section 1983 claim is asserted against the Town of East Lyme, the Board, and Rowe and the named members of the Board in their official and individual capacities, his state administrative appeal named only the Board itself as a party. Although the Board was a party in both actions and can therefore properly assert claim preclusion against Meehan, the court must determine whether the Town of East Lyme, Rowe, and the members of the Board are in privity with the Board such that they too can assert this defense against him. See id.

Connecticut looks to the Restatement (Second) § 51 for guidance in resolving such privity questions. See id. at 194, 629 A.2d 1116. Section 51 provides:

> If two persons have a relationship such that one of them is vicariously responsible for the conduct of the other, and an action is brought by the injured person against one of them, the judgment in the action has the following preclusive effects against the injured person in a subsequent action against the other.
>
> (1) A judgment against the injured person that bars him from reasserting his claim against the

> defendant in the first action extinguishes any claim he has against the other person responsible for the conduct....

Restatement (Second) § 51. Section 51 identifies several relationships which create vicarious liability in this context, including those between master- servant and agent-principal. See Restatement (Second) § 51 cmt. a.

Meehan, in the present action, alleges that the Board and Town have an agent- principal relationship, (see Compl. ¶¶ 4-9.), and that the Town and Board have a master-servant relationship with Rowe and the named members of the Board. (See Compl. ¶¶ 10-18.) Thus, the Town of East Lyme, and Rowe and the named Board members in their official capacities, are in privity with the Board. Therefore, Meehan's section 1983 action against these parties is also barred by the doctrine of claim preclusion.

However, the doctrine of claim preclusion does not bar the present action as to Rowe and named Board members in their individual capacities. See, e.g., *Gregory v. Chehi*, 843 F.2d 111, 120-21 (3rd Cir.1988) (claim preclusion barred action against town and council members in their official capacities, but not in their individual capacities); Restatement (Second) § 36(2). The court nevertheless concludes that Meehan's action against Rowe and the Board members in their individual capacities is barred by the doctrine of issue preclusion because the issue of whether his termination violated federal due process has already been presented to,

considered, and rejected by the Connecticut Superior Court. [FN2]

> FN2. Rowe and the members of the Board may assert issue preclusion against Meehan in their individual capacities even though they were not named as parties in that capacity in the administrative appeal. See *Aetna Casualty & Sur. Co. v. Jones*, 220 Conn. 285, 303, 596 A.2d 414 (1991) (issue preclusion "may be invoked against a party to a prior adverse proceeding or against those in privity with that party."); 1B James W. Moore, et al., Moore's Federal Practice ¶ 0.411[1] at III-206 (2d ed. 1985) ("In the case of collateral estoppel (issue preclusion) ... in most jurisdictions ... a judgment can be pleaded by a stranger [to the prior action] to estop a party to a prior proceeding from denying what was there judicially determined....").

II. Issue Preclusion

In Connecticut, issue preclusion prohibits the relitigation of issues which were 1) actually litigated, and 2) necessarily determined, in a prior action. *Commissioner of Motor Vehicles v. DeMilo & Co.*, 233 Conn. 254, 267, 659 A.2d 148 (1995).

First, "[a]n issue is actually litigated if it is properly raised in the pleadings, submitted for determination, and in fact determined." *Carol Management Corp. v. Board of Tax Review*, 228 Conn. 23, 32, 633 A.2d 1368 (1993). An examination of the pleadings and the Superior Court

decision confirms that Meehan challenged his termination, including the sufficiency of Rowe's notice letter and the hearings, on both state and federal due process grounds, and that the court rejected such claims. (See R. at 23-24, 28-38, 72- 73, 76-77). It is irrelevant that the Superior Court did not specifically address each and every action by Rowe or the members of the Board which Meehan claimed in his 120 paragraph complaint to have violated his due process rights. See *Putnam Resources v. Frenkel & Co., Inc.*, No. CV 123838S, 1995 WL 416194, at *4 (Conn.Super.Ct. July 10, 1995) ("An issue may be actually decided even if it is not explicitly decided, for it may have constituted, logically or practically, a necessary component of the decision reached.") (citations and internal quotations omitted); *Lee v. Board of Educ.*, 181 Conn. 69, 81, 434 A.2d 333 (1980) (in an appeal pursuant to Conn.Gen.Stat. § 10-151(f) "the court must determine whether the appropriate procedure under the statute and the state and federal constitutions was employed ... and whether the evidence relied upon was reliable and substantial and, if believed, sufficient to establish cause under the statute.").

Second, "[a]n issue is necessarily determined if, in the absence of a determination of the issue, judgment could not have been validly rendered." Carol Management Corp., 228 Conn. at 33, 633 A.2d 1368. Here, the Superior Court was required by statute to determine whether all aspects of Meehan's termination comported with state and federal due process, see Lee, 181 Conn. at 81, 434 A.2d 333, and therefore could not have dismissed his appeal unless it determined that the Board's

actions were constitutional in all respects.

Finally, in addition to the requirements above, to invoke the doctrine of issue preclusion the issues sought to be litigated in the second proceeding must be identical to those in the first. Jones, 220 Conn. at 297, 596 A.2d 414. In this inquiry, "the court must determine what facts were necessarily determined in the first trial, and must then assess whether the [party] is attempting to relitigate those facts in the second proceeding." Id.

The court concludes that Meehan's current federal due process challenge to his termination under section 1983 is the same issue and arises from the same facts as those presented to and decided by the Superior Court. Meehan argued in his administrative appeal that his termination, including the notice letter by Rowe, the impartiality of the Board members, and inadequacy of the hearings, violated his state and federal due process rights. Meehan now seeks to relitigate the same facts and issues, albeit on federal due process grounds only. (Compare, e.g., Compl. ¶¶ 98-144 with R. at 23-25, 28-39, 72-73, 76-77, 80-81.) This difference, or other minor discrepancies in the pleadings between the two actions, does not prevent the issue preclusion bar from applying here. See Putnam Resources, 1995 WL 416194, at *4 ("The issue sought to be precluded need not be precisely identical ... as long as it is substantially the same or at least clearly derivative of the prior court's decision on that issue....") (citations and internal quotations omitted). Accordingly, Meehan is now barred from relitigating the issue of due process against Rowe and the members of the Board in their

individual capacities.

Because Meehan is precluded from bringing any of the matters presently before this court by Connecticut's doctrines of claim and issue preclusion, the court need not address the defendants' substantive objections to Meehan's claims.

CONCLUSION

For the foregoing reasons, the defendants' Motion for Summary Judgment [doc. # 26] is hereby GRANTED.

SO ORDERED this 20th day of March, 1996 at Bridgeport, Connecticut.

s/ Alan H. Nevas
United States District Court

234 Conn. 904

Howard MEEHAN

v.

BOARD OF EDUCATION OF the TOWN OF EAST LYME.

Supreme Court of Connecticut.

Decided June 1, 1995.

Barry Ward, New London, in support of the petition.

Kenneth J. McDonnell, Essex, in opposition.

The plaintiff's petition for certification for appeal from the Appellate Court, 37 Conn.App. 922, 655 A.2d 1177 (AC 13441), is denied.

37 Conn. App. 922 (1995)

Howard MEEHAN

v.

BOARD OF EDUCATION OF the TOWN OF EAST LYME.

No. 13441.

Appellate Court of Connecticut.

Argued March 20, 1995.
Decided April 18, 1995.
Certification Denied June 1, 1995.

Appeal from a decision by the defendant terminating the plaintiff's employment as a tenured teacher, brought to the Superior Court in the judicial district of New London, and tried to the court, Hendel, J., which found in favor of the defendant; thereafter, the court, Hurley, J., rendered judgment dismissing the appeal, from which the plaintiff appealed to this court. Affirmed.

Gilbert Shasha, with whom, on the brief, was Barry Ward, New London, for appellant (plaintiff).

Kenneth J. McDonnell, Essex, for appellee (defendant).

Before LAVERY, SPEAR and FREDERICK A. FREEDMAN, JJ.

PER CURIAM.
The judgment is affirmed.

Howard MEEHAN

v.

EAST LYME BOARD OF EDUCATION.

No. 525063.

Superior Court of Connecticut, Judicial District of New London at New London.

March 9, 1994.

MEMORANDUM OF DECISION

HENDEL, Judge.

This is an appeal brought by plaintiff Howard Meehan pursuant to General Statutes § 10-151(f) from a decision of defendant East Lyme Board of Education ("Board") to terminate the plaintiff's position as a tenured teacher. The plaintiff was terminated pursuant to proceedings under General Statutes § 10- 151(d).

The plaintiff alleges the following facts. The plaintiff was a tenured teacher in the Town of East Lyme school system. On June 17, 1992, the plaintiff was notified by the superintendent of schools, Harold G. Rowe ("Superintendent") that the Board would consider the termination of the plaintiff's contract at its next regularly scheduled meeting. On June 22, 1992, the plaintiff appeared at such meeting with his attorney. The Board voted to consider the termination of the plaintiff's employment contract and written notice thereof was sent

by the Superintendent to the plaintiff.

On June 25, 1992, the plaintiff's counsel timely requested a hearing and written statement from the Board pursuant to § 10-151(d). By letter, dated June 30, 1992, the Superintendent sent to the plaintiff a statement of twenty- four reasons underlying the Board's vote to consider the termination of the plaintiff's employment contract. The Board held evidentiary hearings on the charges against the plaintiff on nineteen dates from July 14, 1992, through October 7, 1992. The Board then voted to terminate the plaintiff's contract of employment. The Board's written findings were signed by the chairman of the Board on October 29, 1992.

The plaintiff argues that the written statement sent by the Superintendent to the plaintiff was deficient because it was signed by the Superintendent instead of the Board. The plaintiff further argues that the written statement was too broad and, therefore, violative of due process notice requirements under federal and state law.

In *Kolenberg v. Board of Education*, 206 Conn. 113, 118-120 (1988), cert. denied, 487 U.S. 1236, 108 S.Ct. 2903, 101 L.Ed.2d 935 (1988), the Connecticut Supreme Court stated:

> General Statutes § 10-151, the Teacher Tenure Act, provides for continuing employment of tenured teachers, except that a teacher may be terminated for inefficiency or incompetence, insubordination, moral misconduct, medical disability, elimination of the teaching position or loss of the position to another

teacher, or other due and sufficient cause. General Statutes § 10- 151(d)(1) through (6).

Section 10-151 sets forth procedures for notice to the teacher and hearing before an impartial panel on a failure to renew or termination of a contract, as well as the right to appeal the decision to the superior court. Subsection (f) of General Statutes § 10-151, which provides the right of appeal, states in pertinent part:

> Any teacher aggrieved by the decision of a board of education after a hearing as provided in subsection (d) of this section may appeal therefrom, within thirty days of such decision, to the superior court."

In reviewing the action of a board of education pursuant to § 10-151(f), the court determines whether the board acted illegally, but does not substitute its judgment for that of the board. *Rado v. Board of Education*, 216 Conn. 541, 555 (1990).

When the board terminates a teacher's contract it is an administrative agency acting in a quasi-judicial capacity. *Miller v. Board of Education*, 166 Conn. 189, 191 (1974). The board has the duty to give the tenured teacher a fair hearing. *Catino v. Board of Education*, 174 Conn. 414, 417 (1978).

The plaintiff argues that the letter he received from the Superintendent in response to the plaintiff's request for reasons why the board voted to consider the termination of his contract is defective because it was signed by the

Superintendent and not the Board itself. The defendant argues that the Superintendent, acting on behalf of the Board, had the authority to send the letter and, thus, complied with § 10-151(d).

The superintendent of schools is the chief executive officer of the board of education. General Statutes § 10-157. As such, the Superintendent's actions constitute the actions of the board of education unless the superintendent acts outside the scope of his authority. See *Petrovich v. Board of Education*, 189 Conn. 585, 588 (1983). The notice function may be delegated by a local board to its superintendent. *Joanou v. Board of Education*, 165 Conn. 671, 673 (1974) (notices from the superintendent are sufficient concerning the nonrenewal of a teacher's contract and setting forth reasons why the teacher had not been renewed).

The court, therefore, finds that the Superintendent appropriately sent notice to the plaintiff in accordance with § 10-151(d).

The plaintiff further argues that the Superintendent's letter does not satisfy due process requirements. He argues that the letter does not focus the issues nor state any detail and, therefore, does not provide him with reasonable notice of the charges against him. The defendant argues that the Superintendent's letter complies with the notice requirements of § 10-151(d).

The plaintiff, as a tenured teacher, had a property right to continued employment which was entitled to protection under the due process clauses of the federal and state

constitutions. *Lee v. Board of Education*, 181 Conn. 69, 72 (1980). Because the charges against the plaintiff reflect upon his "professional competence and character," the charges also implicate a liberty interest entitled to protection under the due process clause. *Id.*, 74. "The test of the action of the board is whether the plaintiff had a reasonable opportunity to hear and to be heard upon the charges preferred against him and whether the proceedings were conducted in a fair and impartial manner." *Conley v. Board of Education*, 143 Conn. 488, 493-94 (1956).

The Superintendent's letter charged the plaintiff with

1. Inefficiency and incompetence;
2. Insubordination against the reasonable rules of the Board of Education;
3. Other due and sufficient cause.

These three reasons given for the plaintiff's termination are included in the language of § 10-151(d).

The letter also provided the plaintiff with a list of twenty-four reasons to further justify the Board's decision. The plaintiff's misconduct was divided into eight categories. Examples included using foul and obscene language with sexual overtones, using language, gestures and actions that were humiliating, demeaning and intimidating and placing his hands on and using force on students. For specific dates, names, and events, the letter referred to the plaintiff's personnel file which, the letter stated, "is replete with instances which fall within the issues described above."

In Lee, the charges against the plaintiff teacher contained no specific name and only one date. *Lee v. Board of Education*, supra, 70 n. 1. Nevertheless, the court held that the plaintiff had been afforded adequate notice of the charges made. The court also noted at page 7, footnote 7, that:

[T]eachers in this state have access to "supervisory records and reports of competence, personal character and efficiency" that are maintained in personnel files relating to their employment by the local or regional boards of education. General Statutes § 10-151a.

In the present case, the plaintiff was provided with a copy of his entire personnel file by July 1, 1992, within seven days of the plaintiff's request for reasons. Additionally, hearings were held over twenty-one days, thereby affording the plaintiff ample opportunity to prepare his case. An examination of the transcripts of the proceedings demonstrates that the plaintiff had a full and fair opportunity to determine what evidence the Board had against him and to present evidence in his own behalf.

The court finds, therefore, that the actions of the Board met the requirements of due process under federal and state law.

For the reasons stated above, the court finds that the Board did not act illegally in its decision to terminate the plaintiff's contract of employment. Accordingly the plaintiff's appeal is dismissed.